

1
2
3
4
5
6
7
8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
10

11 KEVIN LOMACK,) Civil No. 07cv17-L(WMc)
12 Petitioner,) **ORDER DENYING CERTIFICATE**
13 v.) **OF APPEALABILITY**
14 L.E. SCRIBNER, Warden,)
15 Respondent.)
16

17 Petitioner Kevin Lomack, a state prisoner proceeding *pro se*, filed a Petition for Writ of
18 Habeas Corpus pursuant to 28 U.S.C. § 2254 (“Petition”). Petitioner claims his constitutional
19 rights were violated by a jury instruction regarding eyewitness identification, ineffective
20 assistance of counsel, trial court’s failure to *sua sponte* counter the defense counsel’s defective
21 performance, and sentencing based on fact findings made by the judge rather than the jury. The
22 case was referred to United States Magistrate Judge William McCurine, Jr. for a report and
23 recommendation pursuant to 28 U.S.C. § 636(b)(1)(B) and Civil Local Rule 72.1(d). The court
24 adopted the Magistrate Judge’s Report and Recommendation to deny the Petition, and Petitioner
25 filed a notice of appeal. Pursuant to 28 U.S.C. § 2253(c), a certificate of appealability (“COA”)
26 is **DENIED**.

27 Title 28 U.S.C. § 2253 governs the appealability of habeas corpus petitions. It provides
28 in pertinent part:

1 (c)(1) Unless a circuit justice or judge issues a certificate of appealability, an
 2 appeal may not be taken to the court of appeals from--
 3 (A) the final order in a habeas corpus proceeding in which the detention
 complained of arises out of process issued by a State court; . . .

4 Petitioner filed a Notice of Appeal together with an Application for a Certificate of
 5 Appealability ("Application"). "If an applicant files a notice of appeal, the district judge who
 6 rendered the judgment must either issue a certificate of appealability or state why a certificate
 7 should not issue." Fed. R. App. Proc. 22(b)(1).

8 "A certificate of appealability should issue only if the petitioner has made a substantial
 9 showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). "The COA determination
 10 under §2253(c) requires an overview of the claims in the habeas petition and a general
 11 assessment of their merits." *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). A COA is
 12 authorized "if the applicant has made a substantial showing of the denial of a constitutional
 13 right." 28 U.S.C. § 2253(c)(2). "A petitioner satisfies this standard by demonstrating that jurists
 14 of reason could disagree with the district court's resolution of his constitutional claims or that
 15 jurists could conclude the issues presented are adequate to deserve encouragement to proceed
 16 further." *Miller-El*, 537 U.S. at 327, citing *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)).
 17 Petitioner does not have to show "that he should prevail on the merits. He has already failed in
 18 that endeavor." *Lambright v. Stewart*, 220 F.3d 1022, 1025 (9th Cir. 1983), citing *Barefoot v.*
 19 *Estelle*, 463 U.S. 880, 893 n.4 (1983)). Nevertheless, issuance of the COA "must not be pro
 20 forma or a matter of course," and a "prisoner seeking a COA must prove 'something more than
 21 the absence of frivolity' or the existence of mere 'good faith' on his or her part." *Miller-El*, 537
 22 U.S. at 337-38, quoting *Barefoot*, 463 U.S. at 893).

23 Petitioner seeks a certificate of appealability only with respect to two issues: (1) whether
 24 the trial judge's reliance on facts not found by a jury, including his prior convictions, to impose
 25 an upper term sentence was harmless error; and (2) whether the Sixth Amendment requires that
 26 facts necessary to impose consecutive sentences be found by a jury. (Application at 1-2.)

27 With respect to the upper term sentence, Petitioner maintains that *Almendarez-Torres v.*
 28 *United States*, 523 U.S. 224, 244, 247 (1998), upon which this court relied, is "flawed and

questionable case law.” (Application at 5-6.) Under the Sixth Amendment, “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” *Blakely v. Washington*, 542 U.S. 296, 301 (2004), quoting *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). *Almendarez-Torres* established that the fact of a prior conviction need not be proved to a jury beyond a reasonable doubt. 523 U.S. at 247. This exception was recognized in *Blakely* and *Cunningham v. California*. *Blakely*, 542 U.S. at 301; *Cunningham*, 549 U.S. 270, 288 (2007). Although some Supreme Court justices indicated in dissenting opinions their disagreement with the applicability of *Almendarez-Torres* after *Blakely*, it has not been overruled and this court is bound to follow it. *See Butler v. Curry*, 528 F.3d 624, 643-44 (9th Cir. 2008).


Petitioner also maintains that the court did not follow the prerequisites for applying the *Almendarez-Torres* exception as stated in *Butler*. *Butler* held that any facts not apparent on the face of the conviction documents fall outside the scope. *Id.* at 644. It articulated three prerequisites to ensure that the exception encompasses only the facts directly reflected in the conviction documents. *Id.* at 645. Petitioner does not maintain that the sentencing court relied on any “secondary” facts derived or inferred from the prior conviction documents. To the contrary, he acknowledges that the “trial court merely pointed out that Petitioner has prior convictions.” (Application at 6.) The sentencing court’s reliance on the fact of Petitioner’s prior convictions was within the scope of *Almendarez-Torres*.

Last, Petitioner seeks a certificate on the issue of consecutive sentences, maintaining that the same Sixth Amendment right to a jury trial which applies to the penalty for a singular crime also applies to the determination whether multiple sentences should run consecutively or concurrently. (Application at 7.) This court found that there was no clearly established Supreme Court law to support the proposition that Petitioner’s Sixth Amendment rights were violated by the imposition of consecutive sentences. Since the entry of judgment in this case, the Supreme Court has squarely addressed the issue. The imposition of consecutive sentences does not implicate the Sixth Amendment right to a jury trial. *Oregon v. Ice*, 129 S. Ct. 711 (2009).

1 Based on the foregoing, Petitioner has not made a substantial showing of the denial of a
2 constitutional right as required by 28 U.S.C. § 2253(c)(2). The court therefore declines to issue
3 a certificate of appealability.

4 **IT IS SO ORDERED.**

5
6 DATED: February 20, 2009

7 
8 M. James Lorenz
United States District Court Judge

9 COPY TO:

10 HON. WILLIAM McCURINE, Jr.
UNITED STATES MAGISTRATE JUDGE

11 ALL PARTIES/COUNSEL
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28